U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 14-0405 BLA

ARCHIE M. BULLINER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HERITAGE COAL COMPANY, formerly known as PEABODY COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE	)	DATE ISSUED: 08/31/2015
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Stephen R. Henley, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Rebecca J. Fiebig (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Granting Benefits (2011-BLA-06112) of Administrative Law Judge Stephen R. Henley, rendered on a subsequent claim filed on August 16, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge credited claimant with at least twenty years and seven months of underground coal mine employment, as stipulated by the parties. Based on the filing date of the claim and his determinations that claimant established at least fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment, the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] The administrative law judge further found that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Additionally, the administrative law judge determined that employer did not rebut the amended Section 411(c)(4) presumption and awarded benefits accordingly.

On appeal, employer contends that the administrative law judge erred in discrediting the opinions of Drs. Tuteur and Rosenberg, relevant to rebuttal of the amended Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter brief, asserting that the Board should affirm the administrative law judge's credibility findings with regard to Drs. Tuteur and Rosenberg. Employer has replied to the briefs filed by claimant and the Director, reiterating its previous contentions.

[1] Claimant filed an initial claim for benefits on December 5, 1994, which was denied by the district director on June 28, 1995, because claimant did not establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant filed a second claim on February 25, 1997, that was dismissed by Administrative Law Judge Donald W. Mosser on March 3, 1999, because claimant did not respond to an Order to Show Cause. *Id*. Claimant took no further action until he filed the current subsequent claim. Director's Exhibit 3.

[2] Under amended Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established at least twenty years and seven months of underground coal mine employment, a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2) and invocation of the amended Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 7-10. Once claimant invoked the presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4),[4] the burden of proof shifted to employer to establish rebuttal by proving that claimant does not have legal[5] and clinical[6] pneumoconiosis or by

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, as claimant's coal mine employment was in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1 at 349, 4.

[4] Employer "notes its objection to the [administrative law judge's] reliance on the fifteen-year presumption to find a change in condition," but concedes that the administrative law judge's finding at 20 C.F.R. §725.309 is consistent with the holding in *Consolidation Coal Co. v. Director, OWCP* [*Bailey*], 721 F.3d 789, 794, 25 BLR 2-285, 2-293 (7th Cir. 2013). Employer's Brief in Support of Petition for Review at 2 n.1. Thus, because it is unchallenged by the parties, we affirm the administrative law judge's finding that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] Legal pneumoconiosis is defined as including "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[6] Clinical pneumoconiosis is defined as:

> [T]hose diseases recognized by the medical community as pneumoconiosis, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive

establishing that "no part of [claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see Minich v. Keystone Coal Mining Corp*., BLR , BRB No. 13-0544 BLA, slip op. at 10-11 (April 21, 2015) (Boggs, J., concurring and dissenting).

The administrative law judge found that the x-ray evidence was negative for clinical pneumoconiosis and that "no physician had diagnosed clinical pneumoconiosis." Decision and Order at 12-13, 16. With regard to the existence of legal pneumoconiosis, the administrative law judge weighed four medical opinions. Dr. Istanbouly diagnosed chronic obstructive pulmonary disease (COPD) due solely to coal dust exposure, believing that claimant had not smoked long enough to develop smoking-related COPD. Director's Exhibit 12. The administrative law judge gave little weight to Dr. Istanbouly's opinion because he relied on an "inaccurate smoking history."[7] Decision and Order at 16. Dr. Rasmussen diagnosed COPD and emphysema due to a combination of smoking and coal dust exposure. Claimant's Exhibit 6. The administrative law judge found that Dr. Rasmussen's opinion was reasoned and documented and "in line with the regulations and analysis of the [Department of Labor] (DOL)" in the preamble to the revised 2001 regulations that the effects of smoking and coal mine dust can be additive. Decision and Order at 17. Drs. Tuteur and Rosenberg both opined that claimant's COPD was due entirely to smoking, and was unrelated to coal dust exposure. Employer's Exhibits 1, 8, 13, 14. The administrative law judge determined that the opinions of Drs. Tuteur and Rosenberg were not sufficiently reasoned and were contrary to the regulations and the preamble. Decision and Order at 18. Thus, the administrative law judge concluded that employer failed to rebut the amended Section 411(c)(4) presumption by disproving the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i). The administrative law judge also found that employer failed to disprove that claimant's disability was not due to legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(ii).

Employer argues that the administrative law judge's reliance on the preamble as a basis to determine the credibility of the medical opinion evidence is contrary to the Act

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> pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

[7] Dr. Istanbouly relied on a six pack-year smoking history, whereas the administrative law judge indicated that the "evidence does not definitively establish [c]laimant's smoking history and it ranges from [one-half pack to one] pack a day for approximately 35 years." Decision and Order at 17; *see* Director's Exhibit 12.

and the Administrative Procedure Act (APA) 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Employer's Brief in Support of Petition for Review at 13-25. Contrary to employer's contention, the preamble to the amended regulations sets forth how the DOL has chosen to resolve questions of scientific fact. *See Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004). Multiple circuit courts, and the Board, have held that an administrative law judge, as part of the deliberative process, may rely on the preamble as a guide in assessing the credibility of the medical evidence. *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *see also Peabody Coal Co. v. Director, OWCP* [*Opp*], 746 F.3d 1119, 25 BLR 2-581 (9th Cir. 2014); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15, 25 BLR 2-115, 2-130 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257, 24 BLR 2-369, 2-383 (3d Cir. 2011); *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 139 (1990). Furthermore, the administrative law judge did not, as employer suggests, utilize the preamble as a legal rule, or as a presumption that all obstructive lung disease is pneumoconiosis, but merely consulted it as a statement of credible medical research findings accepted by the DOL when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *see also Looney*, 678 F.3d at 314-15, 25 BLR at 2-129-32; *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012). Moreover, the preamble does not, as employer suggests, constitute evidence outside the record with respect to which the administrative law judge must give notice and an opportunity to respond. *See Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; *Looney*, 678 F.3d at 316, 25 BLR at 2-132. Thus, we reject employer's assertions that the administrative law judge's use of the preamble violated the Act and the APA.

With regard to the administrative law judge's specific credibility findings, we see no error in the administrative law judge's conclusion that the opinions of Drs. Tuteur and Rosenberg are insufficient to rebut the presumed facts of legal pneumoconiosis and disability causation. Dr. Tuteur explained, in his examination report dated March 23, 2011, that "[i]f one accepts [claimant's] reported cigarette smoking history that is the equivalent of about 12 to 15 pack[-]years over a 40 year time span ending about 12 years ago, then the exposure to coal mine dust over a 22 year period is more likely than not the etiologic factor" for claimant's COPD. Employer's Exhibit 1. Alternatively, Dr. Tuteur opined that if claimant smoked "a level of one package per day for those 40 years," his COPD "would far more likely be due to chronic inhalation of tobacco smoke than coal mine dust." *Id*. At a deposition conducted on February 12, 2013, Dr. Tuteur testified that he had reviewed claimant's treatment records, which revealed a range of reported smoking histories, with a history of one-half pack a day for twelve years on the low-end, and a history of one pack a day for forty years on the high-end. Employer's Exhibit 13 at 9. Dr. Tuteur indicated that, during his examination of claimant on March 10, 2011,

claimant "appeared very confident in his quantification of his cigarette smoking, not only in that it was only a half a pack a day but that he didn't always smoke and then stopped intermittently[.]" *Id*. at 11-12. Dr. Tuteur concluded, however, that while he had "a tendency to accept" what a miner reports in the examination regarding his or her smoking history, based on his review of additional medical records, wherein claimant was reported as smoking a pack a day, claimant's COPD was due entirely to smoking. *Id*. at 24.

The administrative law judge considered Dr. Tuteur's opinion to be equivocal because the "evidence does not definitively establish [c]laimant's smoking history and it ranges from [one-half pack to one] pack a day for approximately 35 years." Decision and Order at 17. Contrary to employer's contention, we conclude that the administrative law judge acted within his discretion in giving Dr. Tuteur's opinion little weight, as Dr. Tuteur did not explain in his deposition why "coal mine dust could not contribute to [c]laimant's condition if in fact he did smoke at the higher range[,]" and "merely cited [medical] literature to defend his etiology conclusions based on the amount of cigarettes smoked." *Id*. at 17; *see Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 735, 25 BLR 2-405, 2-425 (7th Cir. 2013) (administrative law judge may reject an opinion that relies on general statistics); *Freeman United Coal Mining Co. v. Summers*,72 F.3d 473, 483 n.7, 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001).

With regard to Dr. Rosenberg's opinion, the administrative law judge noted that he described claimant as having "the classic pattern of obstruction" for a cigarette smoker, and asserted that it is possible to distinguish impairment related to coal dust exposure from impairment related to smoking based on the FEV_1/FVC ratio. Employer's Exhibit 12 at 13; *see* Decision and Order at 15. Dr. Rosenberg explained that the severe reduction in claimant's FEV_1/FVC ratio is consistent with his smoking-related COPD while "the FEV_1/FVC ratio is generally preserved" when an individual's COPD is caused by coal dust exposure. Employer's Exhibit 12 at 13. Thus, Dr. Rosenberg opined that claimant did not have legal pneumoconiosis and that the totality of his disabling COPD was due to smoking alone.

Contrary to employer's arguments, the administrative law judge considered Dr. Rosenberg's testimony that medical articles post-dating the preamble support his position regarding the use of the FEV_1/FVC ratio to determine whether a miner's COPD constitutes legal pneumoconiosis. Decision and Order at 15. However, the administrative law judge permissibly rejected Dr. Rosenberg's opinion on the ground that he expressed views that are inconsistent with the science credited by DOL in the preamble that coal dust exposure may result in a decreased FEV_1/FVC ratio.[8] 65 Fed.

[8] The Department of Labor stated the following:

Reg. 69,930, 79,943 (Dec. 20 2000); *Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014); *see also Beeler*, 521 F.3d at, 726, 24 BLR at 2-103 (7th Cir. 2008); *Summers*,72 F.3d at 483 n.7, 22 BLR at 2-281 n.7; Decision and Order at 19. The administrative law judge observed correctly that "the decrease in FEV_1/FVC ratio" of less than 55% has been used by DOL to determine total disability, and "it has not been found to only relate to smoke-induced conditions." Decision and Order at 18; *see* 20 C.F.R. §718.204(b)(2)(i).

Although employer challenges the administrative law judge's credibility determinations, the persuasiveness of a medical opinion is a matter for the administrative law judge to decide, and the Board is not empowered to reweigh evidence nor substitute its inferences for those of an administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985). The administrative law judge rationally found that neither Dr. Tuteur nor Dr. Rosenberg adequately explain why claimant's COPD was not significantly related to, or substantially aggravated by, coal dust exposure. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Summers*, 272 F.3d at 483, 22 BLR at 2-280; *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 13 BLR 2-348 (7th Cir. 1990); Decision and Order at 19. Thus, we affirm, as supported by substantial evidence, the administrative law judge's finding that employer failed to rebut the amended Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(2)(i), by establishing that claimant does not have pneumoconiosis.[9] *Minich*, BRB No. 13-0544 BLA, slip op. at 10-11.

As to the presumed fact of disability causation, the administrative law judge properly discounted the opinions of Drs. Tuteur and Rosenberg, that claimant's

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> In addition to the risk of simple [coal workers' pneumoconiosis] and [progressive massive fibrosis], epidemiological studies have shown that *coal miners have an increased risk of developing COPD*. *COPD may be detected from decrements in certain measures of lung function, especially FEV_1 and the ratio of FEV_1/FVC.* Decrements in lung function *associated with exposure to coal mine dust are severe enough to be disabling in some miners*, whether or not pneumoconiosis is also present.

65 Fed. Reg. 69,930, 79,943 (Dec. 20 , 2000) (emphasis added).

[9] Because the administrative law judge provided valid bases for rejecting the opinions of Drs. Tuteur and Rosenberg, we need not address employer's additional challenges pertaining to the administrative law judge's reliance on the preamble. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

respiratory disability was not due to pneumoconiosis, as neither physician diagnosed legal pneumoconiosis, contrary to the administrative law judge's finding that the existence of legal pneumoconiosis had not been disproven by the evidence. *See Burris*, 732 F.3d at 733, 25 BLR at 2-424; *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Scott v. Mason Coal Co.*, 289 F.3d 262, 269, 22 BLR 2-373, 2-383 (4th Cir. 2002); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995). Therefore, we affirm, as supported by substantial evidence, the administrative law judge's determination that employer failed to rebut the amended Section 411(c)(4) presumption by establishing that claimant's respiratory disability was not due to pneumoconiosis as defined in 20 C.F.R. §718.201. 20 C.F.R. §718.305(d)(1)(ii). *Minich*, BRB No. 13-0544 BLA, slip op. at 11 (To rebut the presumed causal relationship between pneumoconiosis and total disability, employer must establish that "no part, not even an insignificant part, of claimant's respiratory or pulmonary disability was caused by pneumoconiosis.").

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge